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July 18, 2000

VIA HAND DELIVERY

Mary Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110

Re: Bell Atlantic - Massachusetts Section 271 Compliance Filing; D.T.E. 99-271

Dear Secretary Cottrell:

Enclosed please find the original and four copies of RCN BecoCom L.L.C.'s Response to Bell Atlantic-Massachusetts' Supplemental Comments filed in the above-captioned docket on May 26th, 2000. The Response includes a Supplemental Statement submitted by Patrick Musseau of RCN-BecoCom. The disk filed herewith contains a copy of the Response in Word and Mr. Musseau's Supplemental Statement. Please date stamp the extra copy and return it in the self-addressed, stamped envelope provided.

Two copies of the enclosed filing have been mailed to Hearing Officers Carpino and Chin and copies have been distributed electronically and by U.S. first class mail to all parties of record. Please note that the Word disk and the electronic versions of the Response do not contain Attachments A, B, and C to Mr. Musseau's Supplemental Statement.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

William L. Fishman
Counsel to RCN-BecoCom, L.L.C.

Enclosures

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COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts - Section 271 of the Telecommunications Act of 1996 Compliance Filing	)))	Docket No. 99-271

RESPONSE OF RCN-BECOCOM, L.L.C. TO SUPPLEMENTAL COMMENTS OF BELL ATLANTIC-MASSACHUSETTS

RCN-BecoCom, L.L.C. ("RCN"), a party to the above-captioned proceedings, herewith responds to the Supplemental Comments of Bell-Atlantic-Massachusetts ("BA-MA"). RCN focuses this response on checklist item number 3 (access to poles, conduits and rights-of-way). Contrary to BA-MA's bland assurances to the contrary, BA-MA does not provide access to poles consistent with the requirements of §§ 224 and 271 of the Communications Act (the "Act"). As demonstrated herein to the contrary, BA-MA maintains a pole access regime which is hostile to attachers and which inhibits and delays the competitive provision of telecommunications and cable service to retail subscribers in the Commonwealth. The Department should find that BA-MA has failed to meet checklist item number 3, and direct BA-MA to reduce barriers to entry if it wishes to secure the Department's support for its § 271 application.

I. BACKGROUND

As the record already reflects, RCN is a CLEC certificated in the Commonwealth to provide telecommunications service. It provides as well high speed Internet access and both franchised cable and Open Video Service ("OVS") in Massachusetts. RCN is actively building its own distribution facilities, consisting of state-of-the-art fiber optic cable which carries all of RCN's services on an integrated basis. Unlike most CLECs, RCN concentrates its competitive service offerings in the residential market. This means that it has greater need than most CLECs

to access large numbers of private and MDU residences, and accordingly requires access to many more poles than most CLECs in Massachusetts.

As detailed in prior testimony of RCN, it has experienced difficulties, delays, and excessive costs in attempting to secure access to BA-MA poles in the Boston suburban area.[1] Recently, RCN has concentrated extraordinary difficulties in building out its distribution plant in Quincy and surrounding communities, principally attributable to BA-MA's unwillingness to cooperate with RCN in respect to pole attachments. These recent difficulties are set forth in detail in the attached Supplemental Statement of Patrick Musseau. As described therein, while BA-MA has made certain efforts to create a public record demonstrating its cooperative attitude, and in certain specific respects has improved or agreed to improve access to its poles, it continues to impose numerous unreasonable restraints on RCN's access to its poles, including excessive delays and costs, discriminatory denial of certain attachment procedures, refusals to hire and/or train sufficient in-house personnel to meet the needs of the CLEC and cable pole attachers, and, most troubling, the imposition of arbitrary limits on the number of poles for the use of which RCN may apply.

In its Supplemental filings and affidavits, BA-MA presents a rosy picture which is built to a great degree on aggregate data carefully and thoughtfully designed and compiled by BA-MA to suit its own purposes. RCN does not have access to those data and does not have the resources to dig beneath the surface, as indeed most CLECS do not. What RCN can contribute to this record is a detailed recitation of the situation it faces in Quincy, which it has every reason to believe is representative of the state of pole access in Massachusetts.[2] That recitation

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[1] *See* Statement of Patrick Musseau On Behalf of RCN-BecoCom, L.L.C., dated November 12, 1999, and transcript of Technical Session held on December 2, 1999, particularly p. 2540 and pp. 2597-2633 *et seq.*

[2] As stated at the December 2, 1999 technical session by Conversant's representative: "Now, we don't have access to that aggregate data really to be able to rebut that, but we do have a story to tell about our individual experience with trying to obtain access to conduit on a nondiscriminatory and commercially reasonable method, and that's all that we're trying to do." Tr. at 2585.

demonstrates simply, forcefully and dramatically, that BA-MA does not provide reasonable or nondiscriminatory access to its poles, that it favors itself in countless ways, and that it is not compliant with applicable provisions of law.

II. THE LEGAL FRAMEWORK

Checklist item number three, set forth in § 271(c)(2)(B)(iii) of the Communications Act, requires BA-MA to provide "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by [it] at just and reasonable rates in accordance with the requirements of § 224." Section 224, in turn, directs the Federal Communications Commission ("FCC") to implement that section but reserves primary jurisdiction to any state which certifies that it has adopted its own implementing regulations. 47 U.S.C. § 224(c)(1). Massachusetts General Laws, Chapter 166, § 25A, authorizes the Department to adopt regulations concerning access to poles, ducts, conduits, and rights-of-way and the Department has adopted regulations establishing a complaint procedure in the event of disagreement between a pole owner and an attacher concerning the rates, terms and conditions of access.[3] The FCC accepted Massachusetts' regulations as adequate to invoke § 224(c)(1), but did so prior to the 1996 amendment to § 224 of the Act.[4] That amendment added the nondiscriminatory access obligation and granted pole attachment rights to telecommunications companies to the original language of § 224 which was limited to rates and terms, and applied only to cable companies.[5]

In 1998 the Department opened a proceeding to consider the amendment and expansion of its existing pole and conduit attachment regulations, including the adoption of new regulations addressing the nondiscriminatory access provisions adopted in the 1996 amendments to § 224 of

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[3] Docket D.P.U. No. 930; *see* 220 CMR § 45.00.

[4] *See States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992).

[5] *See generally Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, FCC 99-404, at pars. 263-4, *rel.* December 22, 1999, *appeal pending sub nom. AT&T v. FCC* (D.C. Cir.).

the Act.[6] That proceeding remains open and accordingly the Department does not currently have regulations addressing nondiscriminatory access to poles or conduits in Massachusetts.[7] It is nevertheless well within the Department's jurisdiction and indeed is an affirmative obligation under § 271 of the Act for the Department to consider whether BA-MA is currently complying with the nondiscriminatory access provisions of § 224.[8]

Throughout its Supplemental Comments and supporting affidavits, BA-MA premises its contention that it is in full compliance with the 14 point checklist in substantial part on the premise that it was found compliant in New York State by the New York Public Service Commission and thereafter by the FCC,[9] and is providing the same access in Massachusetts and accordingly must be in compliance in Massachusetts.[10] This paradigm, to which BA-MA frequently returns in its recent filings, is a gross oversimplification and is not even factually accurate in respect to the subject matter of this submission, *i.e.*, pole access.[11]

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[6] *Order Instituting Rulemaking to Establish Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way*, DTE Docket No. 98-36 (1998).

[7] In the affidavit of Gloria Harrington filed on May 14, 2000, BA-MA asserts that it provides nondiscriminatory access to poles and implies that the Department would find that it does so without more if it is in compliance with the Department's regulations. (Harrington, at par.10). This is erroneous as a matter of law, however, since the Department's regulations do not address nondiscriminatory access to poles.

[8] The FCC has indicated that absent state regulation of terms and conditions of nondiscriminatory attachment access, it retains jurisdiction under 224(c)(1). *Local Competition First Report and Order*, 11 FCC Rcd 15,499 at 16,104 (1996). Presumably, this observation, which antedates the filing of any § 271 application by a former bell operating company, is limited to formal complaints filed outside the parameters of a § 271 proceeding.

[9] *See* n. 3, *supra*.

[10] *See, e.g.* Supplemental Comments, subsection C, at 37.

[11] Although checklist item number 3 concerns access to "poles, ducts, conduits and rights-of-way," § 224(a)(4), 47 U.S.C. § 224(a)(4), defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications serve to a pole, duct, conduit, or right-of-way owned or controlled by a utility." Accordingly, RCN's references herein to "pole attachment" encompasses other kinds of attachments to the extent the context requires.

In approving Bell Atlantic's New York § 271 application, the FCC noted that no allegation of discriminatory access to poles had been presented and accordingly, there was no need for the Commission to consider the matter.[12] In New York the principal area in which RCN required access to distribution facilities was in Manhattan in which a monopoly supplier, Empire City Subway, is responsible for all underground conduit. There are few, if any, poles in Manhattan and accordingly access to poles was not a significant concern for RCN or any other CLEC in the New York context. By contrast, RCN's principal mode of distribution of its fiber optic lines in Massachusetts is by attachment to aerial poles. Accordingly, the FCC's approval of Bell Atlantic's New York application has no relevance or precedential value whatsoever to the present application before the Department insofar as BA-MA's compliance with its pole attachment obligations is an issue.

III. RCN'S ACTUAL EXPERIENCE IN QUINCY

As suggested above, RCN is not in a position to analyze other CLECs' pole attachment experiences with BA-MA. It can, however, elaborate on its own, and has already provided the Department with testimony from Mr. Patrick Musseau, who is the Aerial and Underground Licensing Supervisor for RCN throughout New England. Mr. Musseau submitted testimony for the record and appeared on a Technical Session panel, as noted above. In the attached Supplemental Statement Mr. Musseau supplements his earlier testimony by describing RCN's struggles since his prior appearance in this docket to get access to BA-MA poles in the town of Quincy. These real world difficulties belie all of BA-MA's soothing, broad-based assurances that it provides nondiscriminatory access and does so on just and reasonable rates and terms. The reality is quite the opposite: by delays, excessive fees, arbitrary restrictions on pole access

[12] In the New York § 271 proceeding RCN had challenged Bell Atlantic's access policies and practices in regard to access to conduit. *See* n. 5, *supra*, at ¶ 267. Similarly, in its recent approval of SBC's § 271 application involving Texas, no challenge to SBC's pole attachment practices or policies was raised below and that decision is accordingly of no relevance. *See Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance To Provide In-region InterLATA Services in Texas*, FCC 00-238, *rel.* June 30, 2000 at ¶ 245, *appeal pending sub nom. AT&T v. FCC* (D.C. Cir.).

applications and by flatly refusing to treat RCN in a manner equivalent to the way in which it treats itself, BA-MA makes all too clear that its internal corporate culture is hostile to CLECs and cable operators and that the filings made with this Department concerning checklist item number 3 are willful and knowing misrepresentations of the real situation.

Specifically, in the attached Statement, Mr. Musseau notes the following:

- Under the regime under which BA has insisted RCN seek access to the almost 10,000 poles RCN requires to fulfill its franchise obligations in Quincy, it will take 4 years to install its system;
- Through no fault of its own, RCN has been unable to meet the buildout obligations which the town of Quincy imposed on RCN when it granted the company a cable franchise;
- While BA-MA mouths platitudes about cooperating with the City and with RCN, it refuses to diverge in the slightest degree from its pre-ordained policies; it even refuses to allow RCN to use the municipal space reserved for the City of Quincy, even though the Mayor has expressed concern about the slow rate of progress of RCN's build-out.[13]

The problems RCN faces in Quincy, although especially acute because of the large number of poles to which RCN requires access, are representative of those it has experienced and will continue to experience in other communities unless the Department steps in to compel BA-MA to open its poles to more even-handed competitive access. These problems are summarized below.

[13] In its Supplemental Filing, BA-MA claims that it does not generally use reserved municipal duct space for its own purposes but on occasion may do so on a temporary or emergency basis and that "existing municipal duct space is available to all licensees for emergency or maintenance reasons on a similar temporary basis." Supplemental Filing at 48. Given the exigencies in Quincy, an incumbent facing pressure from a municipal government to expedite construction of a competitive distribution system, and which genuinely wished to expedite such competitive service, might have been more forthcoming than BA-MA.

1. Limitations imposed on access to poles. BA-MA will not permit RCN to apply for as many poles as RCN needs to service a large and geographically dispersed clientele of retail residential subscribers. In his prior testimony at the Technical Session held on December 2, 1999, Mr. Musseau indicated that in the town of Quincy RCN requires access to nearly 10,000 poles.[14] RCN further indicated that it needed access to 60,000 poles in the Boston suburban area in the coming year, and had already submitted applications for 10,500 poles.[15] While it proposes to soften the flat ban on the filing of applications to access more than 2000 poles at any one time, BA-MA refuses to deny itself the ultimate discretion how many poles to *allow* RCN to apply for. See the draft modified Pole Attachment Agreement showing proposed revisions filed in response to NECTA's requests, ¶ 4.2.

The retention of this discretion is unlawful, impedes RCN's planning, and makes RCN some sort of second class supplicant seeking favors instead of a certificated CLEC and franchised cable operator asserting its legal rights.[16] BA-MA claims that the limitation to the submission of pole attachment requests to no more than 200 at any one time and the retention of discretion to process no more than 2000 "is intended to prevent a single CLEC from potentially using most or all of BA-MA's resources with an unusually large request." Supplemental Comments at 47. There are numerous flaws in this reasoning. It is not BA-MA's mandate to put limits on the flow of attachment license requests. It is not BA-MA's mandate to act as the traffic cop in respect to which CLEC or cable company first seeks access to any particular pole, nor is it BA-MA's mandate to handicap any one potential attacher as against any other. If BA-MA lacks

[14] Tr. 2599. The average town contains 4500 to 5000 poles. *Id.*

[15] Tr. 2602-2604. At Tr. 2607 Mr. Musseau indicates that RCN has submitted applications for in excess of 9500 poles. This constituted an oral waiver by BA-MA of the 2000 pole limitation which appeared in the master aerial licensing agreement which BA-MA and RCN signed. Tr. 2609-2610.

[16] RCN is hit especially hard by this limitation because, as noted above, it requires more dense distribution networks (and hence more pole attachments) than other CLECs. *See* Tr. 2706 where Mr. Hager, testifying for AT&T, noted that AT&T, which services businesses, is not adversely affected by the 2000 pole limitation.

adequate resources to process the license requests which are filed with it, its obligation is to add additional staff.

Stated differently, it is unlawful for BA-MA under § 224 or 271 of the Act to constitute itself as a bottleneck to the filing of the attachment licenses potential attachers believe they need. Given the costs of filing such licenses, it is virtually inconceivable that a potential attacher would seek to improperly reserve space on BA-MA poles by seeking more licenses than it needs.[17] Again, it is not for BA-MA to artificially determine how many attachments RCN should apply for, or needs. [18] It is simply BA-MA's job to grant such attachments as are requested and paid for in a diligent and workmanlike way, and to acquire, train, and devote adequate human and other resources to fulfilling that task. If it has not done so, and it appears it has not, it is not in compliance with its market-opening obligations under §§ 224 and 271.[19]

There is certainly nothing in this record to suggest that BA-MA artificially limits its own access to its poles.[20] The fact that it owns or co-owns the poles is legally irrelevant; what matters is what actually happens and BA-MA, which bears the burden of proof on this issue as on all other issues, has not provided evidence that it constrains its own access to poles in the manner it

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[17] In his testimony in the December 2, 1999 Technical Session, Mr. Musseau indicated that RCN had withheld some 65 pole attachment applications because it was waiting for BA-MA and Mass Electric to address the 2000 pole limitation and the cost of filing the 65 applications would be $165,000. (Each application encompasses a large number of poles.)

[18] Mr. Musseau testified that when he asked BA-MA why the 2000 pole limitation was necessary in Massachusetts when no such limitation was imposed by Bell Atlantic in Pennsylvania, "[t]he response was that they did not want CLECs to monopolize Bell Atlantic's time for licensing services... ." Tr. 2601.

[19] BA-MA has taken the position that work on its poles or equipment must be carried out by its own employees and that its labor contract requires such a limitation. Supplemental Comments at 44-45 and Checklist Affidavit at ¶ 156. While RCN believes that its pole attachment needs could be adequately met by hiring outside contractors, it understands that BA-MA may be constrained by a binding contract. In such circumstances, however, it is BA-MA's obligation to hire additional union craftspersons to assure that attachers' technical work can be performed promptly. Instead, it hides behind its labor contract limitations.

[20] Indeed, at Tr.2661-2662 Mr. Musseau testified that BA-MA does not have to fill out the same paperwork and file the same applications to expand its own network.

seeks to do in processing RCN's access requests. Nor does the fact that Mass Electric, the co-owner of the poles in Quincy, also maintains a 2000 pole limitation, excuse BA-MA's ongoing violations of the Communications Act. Mass Electric is not subject to § 271 of the Act, but it is as fully subject to § 224 of the Act as is BA-MA. There is nothing in this record to show that BA-MA has made any effort whatsoever to work with Mass Electric to assure that BA-MA can meet its § 271 obligations.[21] The implication that BA-MA is just as happy to hide behind Mass Electric's 2000 pole limitation as to try to secure its removal, is obvious.

Similarly, when RCN sought the opportunity to do exactly what BA-MA has done on certain poles in Quincy, *i.e.*, to box the poles so as to expedite the buildout of its system, BA-MA has flatly refused except in instances where BA has already done so itself. Its reasons for not permitting further instances of boxing reveal both a willingness to treat RCN in a discriminatory fashion and a high degree of hypocrisy. Presumably BA-MA's own boxing is compliant with all applicable codes. One wonders why RCN's boxing would not be similarly compliant.[22] If, on the other hand, boxing by RCN violates an industry code, how could BA-MA have boxed its own wires? Apparently, when boxing suits BA-MA's needs, it boxes, but when RCN needs to box to fulfill its franchise obligations, BA-MA finds it necessary to strictly enforce codes which it has violated itself on frequent occasions.[23] In its Supplemental Filing BA-MA claims that it

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[21] BA-MA has indicated that once agreement is reached with attachers on the terms of a revised pole attachment agreement BA-MA would seek the cooperation of pole co-owners and proceed unilaterally if necessary to sign the revised agreements. BA-MA response to DTE request No. 4, forwarding NECTA requests 4-5, at p. 4. While this willingness to approach the issue with co-owners is better than doing nothing, it is worth noting that the implication of BA-MA's response is that, although the problems posed by the pole access agreement have been obvious for some time, BA-MA has not yet made any effort to bring the co-owners into the CLEC/NECTA/BA-MA discussions. This is dereliction of BA-MA's affirmative obligation to open its market to competition.

[22] "Boxing" merely refers to the practice of putting wires on opposite sides of a pole if there is not enough room to attach all the wiring on the same side of any given pole.

[23] As set forth in Mr. Steel's letter to the Mayor, appended to Mr. Musseau's Statement, approximately 20% of the poles in Quincy have already been boxed by the co-owners or by others with the acquiescence of the co-owners.

"does not and will not favor itself over other carriers when provisioning access to poles, ducts, conduits and rights-of-way." Supplemental Filing at ¶ 160. In fact, as the letters attached to the Musseau Statement demonstrate, it does exactly what it claims not to do.

Because of the happenstance that the Quincy situation is current, and that BA-MA's letter to the Mayor appears to have been written by a BA-MA employee who was not informed of the company's public party line on § 271 compliance, it is easy for the Department to see that the particular assertion quoted immediately above is false. More broadly, its falsity should lead to grave concern about the reliability of the many other BA-MA assertions of compliance which are not so neatly refuted by current documentation.

Although BA-MA seeks to justify delays or complications by noting that many of the subject poles are jointly owned with an electric utility,[24] the reality is, as the facts in Quincy make clear, that the co-owner, Mass Electric, is substantially more forthcoming and cooperative than BA-MA. RCN encourages the Department to read carefully the letters recently sent to the Mayor of Quincy by Mass Electric and BA-MA in respect to the question of RCN's access to poles there and which are appended to Mr. Musseau's attached Statement. The BA-MA letter exemplifies the reality that not too far below the surface of BA-MA's seemingly endemic affirmations of good behavior is a glacial, flat, and rather arrogant refusal to cooperate with RCN to expedite its access to the subject poles.

It is this letter, and the attitude it so clearly reflects, which is the reality faced by RCN in Quincy. While CLEC workshops are all very nice, make a useful record of BA-MA's willingness to cooperate, and have even led to implementation of certain minor advances, the bottom line is always that BA-MA is not truly willing to make its poles available to RCN on nondiscriminatory and just and reasonable terms.

[24] *See, e.g.*, Supplemental Comments at 41.

2. The Pole Attachment Agreement

The draft modified Pole Attachment Agreement which has been submitted by Bell Atlantic in response to NECTA's information request, showing certain alterations in the text of the existing agreement, is also well worth careful review since it, like the BA-MA letter to the Mayor of Quincy, demonstrates clearly and forcefully the reality of the situation: BA-MA will, in its own discretion, decide upon the terms of a pole attachment agreement. Those terms, even as somewhat modified and softened by BA-MA after having been challenged by various attachers, remain one-sided to an extraordinary degree. Anyone with experience in commercial negotiations will recognize that two arms-length parties of roughly equal bargaining power would not be likely to agree to the Pole Attachment Agreement now preferred by BA-MA.

In that agreement, BA-MA reserves to itself rights superior to those of the attacher to a degree not necessitated by the circumstances. That is, RCN recognizes that as the owner or co-owner of the poles, BA-MA must have authority to grant new attachment rights. But it is not clear why BA-MA's indemnification obligations to an attacher are so much weaker than those owed by an attacher to BA-MA or why its obligations to avoid damage to an attacher's equipment are so much more limited than the attacher's obligation to protect BA-MA's poles and equipment.[25] In its response to the NECTA information request, BA-MA expresses the view that

[25] Compare indemnification provisions in the draft revised pole attachment agreement concerning the owners obligations to the attacher with the attacher's obligations to the owner in §§ 13.4 and 13.5, and the provisions governing damage by an attacher to a pole owner in §13.2 with the duties of the owner to the attacher in § 13.3. BA-MA's unconscionable overreaching is more broadly illustrated by reference to the information request propounded by NECTA 4-7 as transmitted by DTE in Set # 4, and the answers supplied thereto by BA-MA at pp. 2-4. The Department must keep in mind that the proposed revised pole attachment agreement represents a substantial improvement as compared with the one currently in effect and which RCN was compelled to sign. And yet even the revised agreement reflects BA-MA's unilateral assertions of decision-making authority. In instances where an attacher is unhappy with the outcome of a BA-MA-determined resolution, BA-MA suggests that the attacher simply file a lawsuit or a complaint at the DTE. *See, e.g.*, responses a), b), and c). BA-MA also minimizes the practical consequences of harsh terms by assurances that it would not exercise its rights except in extreme cases. *See, e.g.*, b). Given BA-MA's history and incentives, this is cold comfort and is no basis on which to allow BA-MA to provide InterLATA service.

the terms of the pole attachment agreement are "consistent with normal commercial practices." BA-MA response, at 2. RCN respectfully disagrees. The terms and the overall tone of the Agreement, even as revised, are consistent with a monopolist which controls an essential facility imposing one-sided and anticompetitive conditions on another party.

Indeed, this kind of disparity appears throughout the pole attachment agreement. In the aggregate these disparities in the terms of the agreement indicate that BA-MA will grant to attachers only the fewest, most constrained rights which it believes it can get away with. It is up to the Department to call BA-MA's bluff in this respect. RCN suggests that, before the Department approves BA-MA's § 271 application, it should require BA-MA to make pole attachments available to potential attachers in a regime which is in principle similar to that applied to BA-MA's collocation and interconnection obligations.

If that requires a delay in resolving BA-MA's § 271 application while appropriate, even-handed and pro-competitive pole attachment rules are worked out by the regulator, so be it. BA-MA has had almost exactly four and one half years to fulfill the market opening mandate of § 271 of the Act. The picture presented in Mr. Musseau's attached Statement concerning the situation in Quincy is not pretty, and indicates that BA-MA is continuing to drag its feet and to do as little as possible to expedite the introduction of competitive carriers in its operating territory. The present status is not acceptable and should not be approved or countenanced by a favorable recommendation under § 271.

IV. CONCLUSION

In this response to BA-MA's most recent filings, RCN concentrates on the practical inadequacies of BA-MA's current policy and practice in respect to pole attachments, and particularly on the situation in Quincy, which is critical for RCN and indicative of the incumbent's rigid, arrogant, and unyielding determination to hobble new entrants and to maintain its own dominance over access to facilities which are crucial for new competitors. While BA-MA has demonstrated a masterful ability to grind out large volumes of soothing assurances, accompanied by carefully crafted aggregate data to demonstrate that the local market is open, the Department must look behind those generalizations and focus on individual instances in which the truth is likely to be found. RCN is well aware that anecdotal evidence is no substitute for comprehensive analysis. But in the case of Quincy the Department has an unusual opportunity to see how BA-MA really operates. It is, so to speak, "ground truth" and amply demonstrates that BA-MA has not fully opened the local market to competition as required by checklist item number 3. Until BA-MA has done so, the Department should not support BA-MA's § 271 application.

Respectfully submitted,

RCN-BecoCom, L.L.C.

By: 

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July 18th, 2000.

Att A: Supplemental Statement of Patrick Musseau

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts - Section 271 of the Telecommunications Act of 1996 Compliance Filing	)))	Docket No. 99-271

SUPPLEMENTAL STATEMENT OF PATRICK MUSSEAU

My name is Patrick Musseau. I am responsible for RCN's aerial and conduit licensing in New England. I have submitted testimony previously in this proceeding and appeared in a Technical Session on December 2, 1999. My credentials are therefore a matter of record. I have been asked to describe the difficulties and delays RCN has experienced in securing access to poles jointly owned by Bell Atlantic-Massachusetts ("Bell Atlantic," or "BA-MA") and Mass Electric ("ME") in Quincy.

1. SUMMARY

RCN's experience in Quincy has been one of frustration and constant delay. In Project Meetings prior to the pole surveys RCN inquired as to several proven methods that could mitigate excessive and unnecessary make-ready work such as "boxing" poles, the use of extension brackets, and making temporary attachment to poles. Bell Atlantic would not allow RCN to use these methods of aerial construction, despite the fact that RCN could demonstrate that such practices were widespread and employed not only by Bell Atlantic, but also

by other licensees including CATV and Competitive Local Exchange Carriers (CLECs). We noted that provisions for pole boxing and the use of brackets can be referenced in the Bluebook, which is the construction standard for building network facilities on Bell Atlantic poles.[1] RCN has been held to different make-ready standards than that of the other attachers and we are being treated unfairly. BA-MA has been reluctant and lackadaisical in resolving the make-ready disputes and addressing issues that have arisen during the surveys, as well as in preventing additional disputes by communicating to field personnel.

2. BACKGROUND

RCN needs to attach to approximately 9,500 poles in Quincy to fulfill its franchise obligations. As a general rule the space on poles is divided into vertical segments. These segments are the electric "supply" space, the neutral space, and the communications space. Communications attachments are typically 12" apart. The Quincy pole surveys began November 8, 1999 with application QCY99001. The application consisted of 137 poles along Hancock Street, a heavily loaded pole line with electric, fire alarm, CATV and several CLEC fiber optic attachments, in addition to telephone attachments in certain sections. The survey team discovered that a CLEC had "boxed" almost every pole on which it was attached on Hancock Street. In addition, the CLEC was allowed to attach to many poles in different relative locations changing from

[1] Bellcore-Bluebook Manual of Construction Procedures. **Bluebook Section 3, Clearances, Figure 3-1**

above the CATV attachment to below.[2] This is significant for two reasons, the first being that Bell Atlantic specifies the exact height of a new attachment on a pole survey and second, Bell claims, at least in RCN's case, that they do not allow licensees to box poles.

As a practical matter of major significance, the location of the CLEC attachment on poles in Quincy and elsewhere, is inconsistent with the attachment hierarchy adopted as an industry standard. Telephone attachments are placed at the bottom of the "communications space," and are followed by CATV (if present) and then CLEC fiber optic attachments which are typically placed at the top of the "communications space." This licensee was allowed to attach below CATV where ample space existed, and costs for make-ready work to correct clearance violations between the communications and safety space on these poles were not assessed to this licensee. These costs and more and are now being levied on RCN.

Field personnel would not acknowledge these inconsistencies when determining the cost responsibility of make-ready work required to make the necessary 12" space required for RCN's facilities. Despite claims that RCN is NOT responsible for correction of existing violations, field personnel have ignored such existing violations when these conditions are present. In addition, Bell Atlantic has also reserved space on poles. In the most extreme cases Bell facilities were not even attached and ample useable space existed.

[2] No telephone facilities were attached to these poles, leaving extra usable space for additional

3. FIELD MEETING

On a daily basis in Quincy RCN's attempts to negotiate fair treatment in the field have proven to be unsuccessful. RCN met with Bell Atlantic Staff on November 22, 1999, and then notified Gloria Harrington on November 24, 1999 that we were disputing make-ready charges and sought to resolve these issues quickly. RCN sent notice to Bell Atlantic again on February 22, 2000 and a meeting was finally held March 20, 2000 when the pole owners finally met with RCN.

By this time RCN had documented several instances of make-ready work being unfairly assessed to RCN. Then RCN received additional survey billing charges from Bell Atlantic in excess of the original survey estimates. These too, by RCN's accounting, were inaccurate. Bell Atlantic informed RCN that the CLEC fiber optic cable boxing the poles would be moved to the side of the pole populated by others. Bell also denied knowing of the extent of "boxing" until RCN brought it to their attention. RCN's city-wide survey revealed that 20% of the poles in Quincy were already "boxed." As for reservation of space, Bell Atlantic stated that they would not allow this practice to continue, but apparently failed to communicate this to the field personnel as it persisted throughout the surveys.

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attachments below CATV.

4. MEETINGS WITH THE MAYOR

RCN sought assistance from the City of Quincy for relief as it began to appear that, as a result of BA-MA's delays, inattention, and lack of diligence, we would be extremely hard pressed to fulfill commitments contained in the cable TV license for construction completion within two years. The Mayor of Quincy, James Sheets, called a meeting to inquire as to ways in which Bell Atlantic and Massachusetts Electric could shorten and simplify the construction of RCN's network in Quincy. The meeting was held on March 22, 2000 at City Hall. RCN again proposed ways to expedite make-ready work while maintaining proper safety requirements. On this occasion, Bell Atlantic stated that RCN would be allowed to box poles that were already boxed - - which contradicted statements made two days earlier. As for allowing additional boxing and the use of brackets, Bell Atlantic refused, stating that it was out of their power to change past policies. ME indicated that they could make decisions only after consulting their legal department.

The net result of the meeting was that the Mayor requested that the pole owners respond to RCN's proposals which are documented in Exhibit C (attached). Cooperation was also encouraged as the Mayor stated he wanted his constituents to benefit from residential competition. Massachusetts Electric responded relatively favorably on April 7, 2000, offering alternatives which could facilitate RCN's construction. Bell Atlantic's response, dated May 2, 2000, was completely negative and left no room for compromise. Bell Atlantic's letter, Mass

Electric's letter, and RCN's response are attached hereto as Exhibits A, B, and C, respectively.

Despite the disappointing response, RCN persisted and attended another joint meeting on May 5, 2000, by which time the issues had grown larger and there was no resolution in sight. Bell Atlantic field personnel were still "reserving space," existing violations were not being considered, and RCN's make-ready bill was growing. More promises of cooperation were offered by BA-MA and gestures by RCN to make financial commitments to expedite the surveys and make-ready work were rejected. Bell committed to re-survey poles where RCN alleged "reservation of space." This, of course, adds to the delay of gaining access to the poles. Bell reaffirmed that RCN would not pay to correct existing violations, but indicated that RCN needed to pay make-ready costs as additional requests by other licensees had been submitted and were consequently being held up by RCN's non payment. Delay followed delay.

At a follow up meeting in Quincy, Mayor Sheets expressed disappointment with the lack of progress since the initial meeting. RCN expressed dismay that despite all the promises to cooperate by the pole owners, there was no concerted effort to re-survey the disputed poles and reassess the make-ready work.

On June 12, 2000 the Quincy Commissioner of Public Works was designated by the Mayor as a key contact to attempt to facilitate matters, and attended the joint meeting with all the interested parties. It was at this time,

seven months after the issues first arose, that there was a schedule set to re-survey the original poles which were in question. The survey yielded mixed results, lowering the costs but frequently failing to resolve disputed issues. In the interest of expediting construction, RCN, like other CLECs who seek access, has paid or is in the process of paying for make-ready work that we dispute in order to move on with the make-ready construction. In our experience disputing make-ready costs only delays the party seeking attachment. It is perfectly acceptable to Bell Atlantic to allow a licensee to dispute make-ready work for as long as possible as the work is not started until paid for. Procedures for disputes are vague and when followed, yield more protracted delays. To date, survey costs alone have been paid for Quincy to BA-MA by RCN in the amounts of $245,921.39, and to Mass Electric of $232,150.60, for a total of $478,071.99.

7. JOINT LICENSEE MEETINGS

RCN attended the first joint licensee meetings to provide input to discuss changes to aerial and underground license agreements and to "provide input" to BA-MA. In my opinion, these meetings were designed to demonstrate to the DTE that BA-MA is in compliance with the checklist item by purportedly allowing input from the parties Bell Atlantic seeks to regulate, when in reality Bell Atlantic routinely ignores suggestions by licensees.

Through these meetings, BA is establishing an even more complex licensing bureaucracy which, if implemented as proposed, would require a prospective licensee to follow a BA prescribed process for any work outside of

making a basic service connection. These procedures which insure added delays include:

(1) new requirements for overlashing;

(2) new licenses for power supplies mounted on poles; and

(3) unprecedented licensing of underground riser conduits on poles

With each new procedure there follows inevitable delays in implementation and actual construction. Bell Atlantic must not be allowed to be the ultimate gatekeeper for those who seek to compete. The procedures of the past no longer work for a burgeoning competitive market place.

8. CONDUIT LICENSING

RCN has several locations pending licensing with Bell Atlantic where collocation with Bell is required as a method to hand off traffic in their Central offices. Bell Atlantic changed the procedures for access into these locations which left RCN, and others, without a way to access Bell Atlantic's "0" manholes. RCN has to submit additional paperwork and was forced to bear thousands of dollars in additional costs to license conduit beyond our original scope of work. This has added seven (7) months of delay to making a CO connection, and has cost RCN significant amounts of money. Bell provided RCN with conduit survey results on May 22, 2000 for various locations in the City of Quincy. RCN was prepared to provide payment for these leases recently but was informed that the results we received were inaccurate and that many sections were no longer

available to rent. This is disturbing, as almost two months have passed since we were provided the paperwork.

This concludes my Supplemental Statement. The foregoing is true and correct to the best of my knowledge and belief.

Patrick Musseau

Patrick Musseau
Aerial and Underground License
Supervisor
RCN-BecoCom, LLC

Dated: July 18, 2000

Attachment A: Mass Electric Letter of April 7, 2000

Attachment B: Bell Atlantic – New England Letter of May 2, 2000

Attachment C: RCN letter of May 10, 2000

341099

ATTACHMENT A

NEES

April 7, 2000

Patrick W. Musseau
Aerial Rights of Way Coordinator
RCN-BecoCom, L.L.C.
647A Summer Street
Boston, MA 02210

SUBJECT: RCN-BecoCom, L.L.C. System Build Out in Quincy

Dear Mr. Musseau:

Recently, the mayor of Quincy sponsored a meeting at his office between Bell Atlantic, RCN-BecoCom, L.L.C. and Massachusetts Electric Company to address concerns that RCN-BecoCom has about the field survey and make-ready process for its system build out in Quincy. At this meeting, you made a number of proposals aimed at speeding this process.

1. Box the Poles: RCN-BecoCom proposed locating its cable on the side of the pole opposite the existing communications cables as a way of reducing make-ready pole replacements where the only issue is space on the pole. We have always opposed boxing poles (placing wires on both sides of the pole) because it creates great difficulties in maintaining equipment on the pole and in climbing and replacing the poles and from an operational perspective see no reason to change our position now. As you pointed out, some poles have already been boxed. Of course, where a pole is already boxed we will allow you to place a wire on the less populated side of the pole. Boxing poles will not eliminate the need for field surveys or for pole replacements because pole strength as well as space must be considered.

2. Install Cable Now and Complete Field Survey and Make-Ready Work Later: RCN-BecoCom proposed installing its cable now and performing the field survey later. This creates immediate safety problems. This proposal ignores clearance and pole strength concerns, knowingly allows the creation of safety risks to all workers on the pole and to the general public and is unacceptable to Massachusetts Electric.

3. Install Cable on an Extension Bracket in the Communications Space: RCN-BecoCom proposed installing its cable on a bracket in the communications space to reduce make-ready work. Like boxing the poles, this may help with space problems, but will not eliminate field surveys or make-ready where pole strength is not adequate. We are concerned about reduction of pole strength by drilling many bolt holes through the pole

55 Bearfoot Road
Northborough, MA 01532-1555
Telephone: 508-421-7000

close together. We can accept this alternative provided that pole strength is adequate and bolt holes can be kept at least 4 inches apart to avoid severely weakening the pole.

4. Install Cable in the Safety Space: With this proposal, RCN-BecoCom is basically asking for permission to eliminate the communications space on the pole. Because this will have no impact on our operations, Massachusetts Electric has no objection to this. We do feel compelled to point out that this will have a significant effect on the operations, equipment and work practice requirements of all communications parties attached to the pole, including your attachments and the city's fire alarm system. The NESC defines two types of space on a pole: the supply space (or electric space) and the communications space. The two types of space have different rules for clearances between wires and different safety rules for workers. The NESC allows, but does not require, the creation of a separate communications space on the pole to allow communications workers to take advantage of the less stringent work practice, equipment and training requirements allowed in the communications space. The safety space (NESC Rule 235 specifies minimum clearances at the pole and at mid-span) is required to create a separate communications space. Until a separate communications space is created, the communications wires must be considered to be in the supply space. The NESC does allow the placement of communications wires in the supply space but requires work on those wires to be done to supply space rules. Placing your cable in the safety space would mean that the safety space requirement has not been met and a separate communications space does not exist on the pole. This will not affect Massachusetts Electric because our workers are already required to work to supply space rules. On the other hand, this will have a significant effect on the work practices of all existing communications parties attached to the pole, including the existing cable and telephone companies and the city owned fire alarm signal wires.

5. Install Cable in the Supply Space: RCN-Becom's proposal to install its cable in the supply space on the pole is acceptable to Massachusetts Electric. This type of installation will require close coordination of the designs, installations and work practices of our two companies to meet minimum clearances and work practice requirements of OSHA and the NESC. Massachusetts Electric has a standard policy that covers the installation of all-dielectric fiber optic cable in the supply space on poles and allows other installations, including messenger supproted cables, on an exception basis. The policy is available on the internet at "*http://www.masselectric.com/library/shared/supply14.pdf*." We will need to get our technical people together to work out details of the appropriate design, installation and work practice standards.

6. Temporarily Install RCN-BecoCom's Cable in the Municipal Space: RCN-BecoCom proposed temporarily installing its cable in the municipal space on the poles. This proposal is based on the erroneous notion that there is a space set aside for the city on

each pole that is empty and that you are being denied access to this space. While it is true that Massachusetts Electric has agreed to allow municipal attachments for fire alarm signal systems, it is not true that Massachusetts Electric is blocking use of pole space set aside for this purpose. If there is empty space on a pole and the pole is strong enough to support your proposed attachment, that space is being made available to you, whether or not there is already a municipal attachment on the pole.

If you have any questions, please call me at 508-421-7802.

Sincerely,
MASSACHUSETTS ELECTRIC COMPANY

G. Paul Anundson
Overhead Line Coordinator

c: Mayor James E. Sheets, City of Quincy
M. P. Della Barba
R. L. Francazio
P. Graening
F. Raymond
R. B. Colon
L. Scholl

ATTACHMENT B

Bell Atlantic - New England
125 Lundquist Drive
Braintree, MA 02184

May 2, 2000

Mayor James A. Sheets
City of Quincy
1305 Hancock Street
Quincy, MA 02169

Dear Mayor Sheets:

As you know from your lengthy tenure as chief executive of the City of Presidents, Bell Atlantic strives to be as accommodating as possible in our dealings with municipal governments. Whether through the deployment of state-of-the-art communications services to city agencies or by supporting public schools through our philanthropy program, Bell Atlantic places a premium on partnering relationships with local governments.

This philosophy of partnership continues to guide us as we address the current issue of how best to assist Quincy in realizing its objective of achieving competition in the cable television market. We are eager to facilitate RCN's cable deployment in the most expeditious and safe manner. In addition to being in your interest and that of your city, bringing RCN "on line" with cable and phone service is important to Bell Atlantic because it will be yet another manifestation of our company opening the local network to competition.

It is clearly in Bell Atlantic's interest to bring a spirit of cooperation to the RCN cable deployment project. By working purposefully with RCN and Massachusetts Electric, we are convinced that this project can move ahead briskly. However, safety and good sense dictate that prudence as well as purposefulness must characterize the process.

What follows are Bell Atlantic's answers to specific questions that were raised during our meeting on March 22nd:

1. Can Bell Atlantic speed up the process for RCN to build out its network in Quincy?
   - Bell Atlantic is willing to work with RCN and any other 3rd party licensee to address common issues which can facilitate the process for attaching to Bell Atlantic poles. We conduct monthly meetings with representatives of all third party companies to address mutual concerns and insure process equity. RCN has been represented at these meetings.

2. Will Bell Atlantic allow RCN to "box" the poles?
   - The practice of boxing poles is not an accepted Bell Atlantic construction standard. When poles are surrounded on each side (boxed) by cable an unsafe work environment is created. In addition, a pole owner's ability to replace the pole is greatly impeded. We recognize that some boxed pole conditions do exist in the city of Quincy. However, Bell Atlantic will not allow new boxed pole situations to be created. Moreover, boxing poles will not necessarily speed up the process.

3. Will joint owners allow RCN to attach in the reserved municipal space?
   - No. As a condition of our grant of authority to locate poles on public ways, municipalities require that we reserve space for their use. Bell Atlantic must honor that condition.

4. Will Bell Atlantic allow RCN to attach in the neutral space?
   - No. The National Electric Safety Code provides for the maintenance of a neutral space. A 40" neutral space is standard throughout Bell Atlantic, and neither Bell Atlantic nor any licensee may attach facilities within that space.

5. Will Bell Atlantic allow RCN to use extension brackets?
   - Bell Atlantic's practice is not to use pole extension arms except in rare circumstances. The use of such extension arms impedes the ability of all attachers to maintain facilities and may place additional strain on poles that affects their safety.

It is Bell Atlantic's earnest hope and expectation that we can work harmoniously with the other parties to achieve a result that serves all concerned -- especially the residents of your city.

If you have any questions on this matter, please don't hesitate to call me at 781-380-2700. I look forward to our next opportunity to discuss this or any other engineering issue related to telecommunications service in Quincy.

Sincerely,

Laurie Scholl
Senior Specialist
South Shore Engineering

Robert Noble (rnb)
Senior Specialist
Public Affairs

cc:

P. Musseau (RCN)
F. Raymond (MECo)
R. Mudge(BA)

ATTACHMENT C

165 University Avenue
Westwood, MA 02090
(781) 381-3000

May 10, 2000

The Honorable Mayor Sheets
City Hall
1306 Hancock Street
Quincy, MA 02169

Dear Mayor Sheets:

Welcome to our world. You now have the responses from NEES and Bell Atlantic to the questions raised at the meeting you called on March 22, 2000. RCN noted at that time that under the present approach used by the pole owning utilities to control access to the poles, the City of Quincy could project that competition to telephone and cable television would not become a reality for at least five years. RCN proposed several new approaches for consideration by NEES and Bell Atlantic. These pole owning utilities left the meeting to consider our proposals or offer alternatives that would be responsive to the demands of Quincy residents.

NEES responded first and offered some hope for change in its letter of April 3, 2000. When we contacted Anthony Pini of NEES Com to seek to develop the options offered in the letter we were stopped in our tracks. NEES offered cooperation with one hand but took it back with the other when they told us to make sure that Bell Atlantic would support the pro competition moves of NEES.

Bell Atlantic's response is entirely negative. The utility will not allow "new boxed pole situations to be created"; will not allow RCN to attach in the municipal space; will not allow RCN to attach in the neutral space (which they define incorrectly as a sacrosanct 40 inch zone); and will not allow RCN to use extension brackets. Bell Atlantic will continue to have monthly meetings "to address mutual concerns and insure process equity". Well, I guess that is that.

After waiting six weeks for this thoughtful response from Bell Atlantic, in our world as we have known it, we now wrangle over the issues and debate the validity of Bell Atlantic's positions. This results in more delay and, given the powerful position of the pole owning utility, predictably results in no progress. This is the reason that we sought your assistance to help us work with the utilities to meet our franchise requirement of building the Quincy system in two years.

RCN must be allowed to "box" poles in Quincy, as needed, to facilitate construction. This means that wires may be strung on both sides of poles. The pole owning utilities offer no good reason in opposition to this practice. Utility workers no longer climb poles so the safety concern is not valid. There are methods that can be used to "change out" a boxed pole that do require some added work but the benefits to all parties realized by streamlined construction far outweigh minor impediments when boxed poles are replaced for any reason.

The utilities have acknowledged a changed set of circumstances when it comes to boxing poles. At the present time approximately one out of every five poles in Quincy is boxed because this serves the needs of the utilities. NEES is responsive to this reality when it indicates in its letter to RCN that: "of course, where a pole is already boxed we will allow you to place a wire on the less populated side of the pole". At our March 22 meeting Laurie Scholl stated that this would also be the policy of Bell Atlantic.

RCN is to be allowed to box poles along with the utilities on some 20% of the Quincy plant. Any extension of this practice to facilitate construction by RCN is rejected by both utilities simply because they have the power to do so and they choose to do so. Bell Atlantic and NEES are competitors to RCN. They box their own poles when it suits their needs and refuse to extend the policy to cover RCN's construction. This is blatantly anti-competitive and just plain wrong.

The status quo is unacceptable. The knee jerk negativity of Bell Atlantic is unacceptable. We cannot allow ourselves to be dragged into months of fruitless negotiations. We ask your assistance toward helping us secure the ability to box poles in Quincy when we deem it is appropriate to do so. We will still work with the utilities on preliminary field surveys but the stranglehold that the utilities have over our construction must be loosened.

Our request to the utilities remains simple: let us box. With this simple change we can confidently work toward meeting our franchise requirements in Quincy. If Bell Atlantic continues to resist this positive approach then we should plan to meet to discuss our mutual options.

Thank you for your consideration in this matter. Please contact me with any questions at (781) 381-3107.

Sincerely,

Thomas K Steel, Jr.
Vice President and Regulatory Counsel

cc: G. Paul Anundson
Laurie Scholl
Robert Noble